Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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SPECIAL OBLIGATIONS OF DIRECTORS

This is a statement of the special obligations owed by corporate directors in general, and their application to CELA Directors.

1. In general, directors have very extensive and onerous responsibilities to their corporation. As a "fiduciary" (from Roman law = a person holding the character of a trustee, with the duty to act primarily in the beneficiary's best interests) a director must at all times and in all endeavours respect the trust and confidence granted by the corporation, and act with scrupulous good faith and candor. The fiduciary relationship between director and corporation is most imposing, and similar to the relationship of lawyer/client.

2. It is expected that a director will at all times work to advance to the utmost the interests, goals, concerns, projects, good will and reputation of the corporation, its staff and board of directors. If other interests of a director compete or conflict with the director's work for the corporation, he/she must resign as director. If unsure about whether other interests compete or conflict, the director must immediately disclose those other interests to the board for its consideration. Any doubt should be resolved in favour of the corporation, and against the director.

3. The fiduciary duty to the corporation remains even after the termination of the relationship, with respect to confidential information obtained while associated with the corporation.

4. A director is precluded from obtaining for himself, either secretly or without the corporation's approval any property, business or personal advantage which belongs to the corporation, or which it has been seeking. The director is also precluded from pursuing the above after resigning as director if "the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the corporation".

5. Directors must disclose to the board their interest in relevant contracts, projects or undertakings outside of the corporation. Further, they must report information discovered which in any way impinges on the activities or undertakings of the corporation. CELA directors must be very familiar with the

details of its projects, resolutions, priorities and goals, and those of its clients, members and the organizations of which it is a member. Given the dual public interest and solictor/client nature of its work, and the work of its clients, members, etc., CELA's scope is very broad and its profile very high. Far greater care and caution is therefore required by a CELA director than would be the case in a typical private business corporation. To be effective, CELA must constantly seek to increase its impact, credibility, visibility and general reputation. High profile causes increased scrutiny of its directors and their activities. That scrutiny, if it reveals information which causes controversy, debate or suspicion, can be devastating to CELA's ability to do its job well.

6. Debate, dissension, disagreement or disharmony amongst directors, or between the board and staff, must be kept internal. Resolution is usually consensual, but dissenting views abound. Directors are bound by the decisions and resolutions of the board. They must agree to support them, if they are to continue on as directors. If they cannot support them, they must either resign, or present to the board their difficulty and request its consideration and direction. If they do resign, it is inappropriate to thereafter attack or criticize CELA, its board, staff or activities.

Footnotes

1. Ontario Corporation Manual (DeBoo), 1984 edition
Black's Law Dictionary (4th Ed)
C.E.D. (Ont.), 3rd ed, Vol. 6, title 36

2. The standard of care for directors, established by the Ontario Business Corporations Act, R.O.S. 1980 Chapter 54, section 142, requires them to exercise their powers and discharge their duties "honestly, in good faith, in the best interests of the corporation", and to "exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

PASSED BY MOTION AT THE OCTOBER 6, 1986 MEETING OF THE CELA BOARD OF DIRECTORS.

CANADIAN ENVIRONMENTAL LAW ASSOCIATION: CONFIDENTIALITY AND CONFLICT GUIDELINES

Confidentiality

On a routine basis members of the Board receive information obtained by staff from clients and potential clients. It is important that all Board members appreciate the requirement to treat information received from and about those potential clients as confidential.

Members of the Board are subject to the ethical constraints which apply to a lawyer with respect to confidential information received from a client. The Law Society of Upper Canada imposes the following duty upon a lawyer:

> "The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so."

Members of the Board are subject to the same duty. There should be no disclosures to non-Board members in which information is provided about clients or potential clients unless those individuals expressly or by clear implication authorize such discussions. For example, the fact that a group or an individual

approaches the Board to request representation remains confidential unless and until that fact has been made known by the individual or CELA has in some public way, with the consent of the client, made clear its involvement in the matter.
(Please see commentary to Rules of Professional Conduct, attached.)

Conflict of Interest

Members of the Board must make every possible effort to avoid real or apparent conflicts between their interests as individuals and their duties as members of the Board. Once again, the Law Society of Upper Canada has provided guidance to lawyers which may be of assistance to members of the Board. The Law Society has defined a conflict of interest in the following terms:

> "A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer may be prompted to prefer to the interests of a client or prospective client."

Thus, conflict does not merely mean a direct pecuniary interest adverse to that being dealt with by the Board. The concept would include such an interest but is broader and includes any situation where an objective outsider might reasonably suppose that the judgment of the member of the Board could be adversely affected by the Board member's other interest. For example, a member of the Board who was employed by a tobacco manufacturer would certainly have a conflict of interest in dealing with a potential client who wished to bring an action in furtherance of the rights of non-smokers.

The Board recognizes that no definition of conflict will be universally accepted and that good sense and good judgment must in all circumstances be applied by members of the Board. The rule to be applied to the Board will be that members who believe that they have a conflict should identify themselves at the earliest possible opportunity. Those members should absent themselves from the room during the discussion of that agenda item unless otherwise directed by a vote of the Board. In any event such members should make no effort whatsoever to influence the thinking of any other member of the Board with respect to the matter.

A failure or purported failure to comply with these guidelines shall be referred to Legal Committee for its consideration. Legal Committee shall be free to deal with the matter in its discretion save that a recommendation for the removal of a Board member(s) be ratified by resolution of the Board.

(Please see commentary to Rule 5 of the Rules of Professional Conduct attached.)

These guidelines will be reviewed after one year to determine whether they have been working satisfactorily.

PASSED BY MOTION AT THE OCTOBER 6, 1986 MEETING OF THE CELA BOARD OF DIRECTORS

CONFIDENTIAL INFORMATION

RULE 4

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so.[1]

Commentary

1. The lawyer cannot render effective professional service unless there is full and unreserved communication between him and his client. At the same time the client must feel completely secure and he is entitled to proceed on the basis that without any express request or stipulation on his part matters disclosed to or discussed with his lawyer will be held secret and confidential.[2]

2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or documentary communications passing between the client and his lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.[3]

3. As a general rule, the lawyer should not disclose that a particular person has consulted or retained him about a particular matter unless the nature of the matter requires it.

4. The lawyer owes the duty of secrecy to every client without exception, regardless of whether he is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client whether or not differences may have arisen between them.[4]

5. The fiduciary relationship between the lawyer and his client forbids that the lawyer use any confidential information covered by the ethical rule for the benefit of himself or a third person or to the disadvantage of his client. Should the lawyer engage in literary works such as his autobiography, memoirs and the like he should avoid disclosure of confidential information.[5]

6. The lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another and he should decline employment which might require him to do so.[6]

IMPARTIALITY AND CONFLICT OF INTEREST

RULE 5

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.[1]

Commentary

1. The reason for the rule is self-evident; the client or his affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on his client's behalf are as free as possible from compromising influences.[2]

2. Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information.[3]

3. The Rule requires adequate disclosure to the client so that he may make an informed decision as to whether he wishes the lawyer to act for him despite the presence or possibility of the conflicting interest. As important as it is to the client that his lawyer's judgment and freedom of action on his behalf should not be subject to other interests, duties or obligations in practice, this factor may not always be decisive. Instead it may be only one of several factors which the client will weigh when deciding whether or not he will give the consent referred to in the Rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer and the latter's unfamiliarity with the client and his affairs. In the result, in the judgment of the client his interests may sometimes be better served by not engaging another lawyer. An example of this sort of situation is when the client and the other party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

4. Before the lawyer accepts employment for more than one client